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IN THE SUPREME COURT OF NORTH CAROLINA

FALL TERM, 1953

No. 653

JOE TOWERY,

Appellant,

vs.

STATE OF NORTH CAROLINA

ON APPEAL TO THE SUPREME COURT OF THE UNITED STATES

STATEMENT AS TO JURISDICTION

Appellant files his statement discussing the basis upon which he contends that The Supreme Court of The United States has jurisdiction upon appeal to review the judgment in question, pursuant to Rule 12(1) of The Rules of The Supreme Court of The United States, as amended April 6, 1942.

Opinion Below

The Court below wrote an opinion which is reported in 239 N. C. at 274; and the said opinion of The Supreme Court of North Carolina is made a part hereof, as Appendix A.

Question Presented

1. May a municipality, under its police power, enact regulations which make it a crime for one person to do that which another may do with impunity?

2. If so, may the enactment set up classifications of those who are and those who are not prohibited without some reasonable relation to the public peace, safety, welfare or morals, or to some definite evil sought to be eradicated?

3. Does the prohibition in the ordinance of The City of High Point against the sale by defendant of certain articles of merchandise between the hours of midnight Saturday and midnight Sunday constitute an unreasonable, unwarranted, arbitrary and discriminatory deprivation of the rights, liberties, privileges and immunities of defendant as guaranteed to him by the Fourteenth Amendment.

The questions were raised by motion for judgment as of nonsuit made at the conclusion of the State's evidence (7), at the conclusion of all the evidence (9), by motion to set aside the verdict and for new trial (9) and by motion to set the judgment aside (9).[1] The questions were determined adversely by The Supreme Court of North Carolina. The entire statement of the opinion of The Supreme Court of North Carolina is a part of this statement as to jurisdiction. (See Appendix A at the end of this statement)

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[1] Numerals appearing in brackets refer to record page numbers as appearing in the Record and Case on Appeal, printed in the office of The Clerk of The Supreme Court of North Carolina.

Statute Involved

This case draws into question the validity of an ordinance of The City of High Point, North Carolina, Section 17.32 of The High Point City Code (1950) as amended June 17, 1952, reading as follows:

> "It shall be unlawful for any place of business to remain open for the purpose of selling or offering for sale goods, wares, merchandise or services between the hours of midnight Saturday and midnight Sunday, except as follows: hotels; boarding houses; restaurants; cafes, delicatessen and sandwich shops furnishing meals and selling bread, cooked or prepared meats incidental to the operation of such business; filling stations furnishing petroleum products and automobile accessories; garages furnishing repair work or storage; ice cream or confectionery stores, furnishing ice cream; cigars, tobacco, nuts and soft drinks only; cigar stands and newsstands furnishing cigars, tobacco, candies, nuts, newspapers, magazines, and soft drinks only; drugstores furnishing medical or surgical supplies, cigars, tobacco, ice cream, candies, nuts, soft drinks, newspapers and magazines; ice dealers for the manufacture and sale of ice; dairies, for the manufacture and sale of dairy products; bakeries for the manufacture, sale and delivery of bakery products; provided, that between the hours of 12:00 o'clock midnight, on Saturday, and 5:00 o'clock A. M. Sunday morning, no persons shall sell, expose or offer for sale any meals or drinks in any restaurant, hotel, dining room, grill, cafe, lunch counter, diner or drink stand or in any other public eating place in the city; provided, that the provisions of this section shall not apply to such public eating places in the city that do not have a license for and do not expose or offer for sale or sell beer or wine at any time; provided, further, that the following businesses shall be required to close their places of business between the hours of 10.00 A. M. and 1:00 P. M. on Sunday: filling stations, garages, ice cream parlors and confectionery stores; cigar stands and newsstands;

drugstores; ice dealers; dairies and bakeries. Nothing in this section shall be construed to prohibit publication and sale of newspapers."

Constitutional Provisions Involved

Defendant relies upon the provisions contained in The Fourteenth Amendment reading as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of The United States; nor shall any State deprive any persons of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Matters Relating to Jurisdiction

Timeliness

The judgment of The Supreme Court of North Carolina affirming the judgment of The Superior Court was entered January 15th, 1954. (See Appendix A containing the opinion of the Supreme Court of North Carolina.) The judgment confirming the judgment of the trial court therefore became final on January 15th, 1954. This appeal is duly presented and filed within the 90-day time limit after judgment became final. This appeal is timely.

Nature of Case

This is a criminal case. It is an appeal from a judgment affirming a judgment of conviction on an appeal trial *de novo* in The Superior Court of Guilford County. Appellant was first proceeded against in The Municipal Court of The City of High Point, North Carolina, by warrant. He was charged with violating the ordinance in question on the 26th day of July, 1953. The warrant, among other things, charged:

"Whereas complaint has been made before me this day on oath of C. V. Rich that Joe Towery on or about the 26 day of July, 1953, with force and arms, at and in the County aforesaid, and within the City Limits or within one mile of the City Limits, did willfully and unlawfully operate a place of business, to wit, a curb market by remaining open for the purpose of selling and offering for sale goods, wares and merchandise between the hours of midnight Saturday and midnight Sunday by selling tomatoes, peaches and toilet paper at or about 5:30 P. M. on Sunday, July 26, 1953, in violation of Section 17.32 of The Code of The City of High Point (1950) as amended June 17, 1952, against the statute in such case made and provided, and against the peace and dignity of The State.

C. V. RICH,
Complainant.

Subscribed and sworn to before me this 26 day of July, 1953.

W. G. FRIDDLE,
[SEAL.] *Capt. of Police."*

How Constitutional Question Raised

The constitutional question was raised in motion for judgment as of nonsuit made at the conclusion of The State's evidence and again at the conclusion of all the evidence in the Superior Court of Guilford County, North Carolina (7, 9). The question presented in that Court was considered and overruled. Motions were made to set aside the verdict, and to set aside the judgment, and were overruled (9). Each holding of the trial Court was presented on appeal to The Supreme Court of North Carolina and duly assigned as error (10). The Constitutional question also was presented to The Supreme Court of North Carolina in the brief, on oral argument. See Appendix A as to jurisdiction.

Statutory Provisions Sustaining Jurisdiction

Jurisdiction of The Supreme Court of The United States is invoked under Section 237 of The Judicial Code or 28 U. S. C. 1257(a).

Under the Act of Congress of January 31, 1928, Chapter 14, 45 Stat. 54, and under the Act of Congress of April 26, 1928, Chapter 440, 45 Stat. 466, an appeal may be taken in any case which under prior statute could be received as a matter of right on writ of error. This case presents a state of facts within the jurisdiction of this Court.

Statement of Case

The Proceedings

The appellant pleaded Not Guilty in The Municipal Court of The City of High Point. He was found guilty, sentenced and fined. The case was tried in The Superior Court of Guilford County, on appeal from The Municipal Court of The City of High Point. The appellant pleaded not guilty. The case was tried by a jury and the Judge (2). At the close of the State's evidence and again at the close of all the evidence, motion for judgment as of nonsuit was made (7, 9). Motions were made to set aside the verdict, and to set aside the judgment, and were overruled. (9) At the September 28, 1953, regular Criminal Term of The Superior Court of Guilford County (High Point Division), the Court rendered judgment on the verdict convicting appellant. He was fined Ten ($10.00) Dollars and the costs.

The Facts

It was stipulated that defendant Towery, appellant, sold the articles named in the warrant, to the sale of which police officers testified, and that he received the sale price therefor. (5).

Defendant testified that he operates exclusively as a curb market; and that he sells all items usually handled by curb markets. Specifically, he testified, and his testimony is substantiated by that of police officer and there is no evidence to the contrary, that he sells each and every item permitted to be sold on Sunday under the ordinance, with the exception of petroleum products and automobile accessories. That he is a competitor of restaurants, cafes, delicatessen and sandwich shops, ice cream and confectionery stores, cigar stands and newsstands, drugstores, dairies and bakeries with reference to the sale of: bread, cooked and prepared meats, ice cream, cigars, tobacco, nuts, soft drinks, candies, newspapers, medical and surgical supplies, magazines, dairy products and bakery products, all of which articles may be sold by his competitors on Sunday, while the ordinance compels him to keep his place of business closed. That he holds merchant's licenses issued by The City of High Point for the sale of tobacco, soft drinks and general merchandise.

The Question Is Substantial

The only question is simply: Is the ordinance in question, on its face, unreasonable, arbitrary and discriminatory and therefore unconstitutional in that it denies to the defendant the freedom and equal protection of the laws guaranteed to him by Article One of The North Carolina Constitution, and by The Fourteenth Amendment to The Constitution of The United States?

Fundamentally, any legislation is unconstitutional which permits one person to do an act and which at the same time makes a criminal of another for performing the identical act.

It is universally conceded that it is within the police power of a city to enact and enforce regulations providing

for the quiet observance of a day of rest during each seven days and that the designation of Sunday is logical and preferable; and that in so doing the municipality may provide for a general cessation of business and, further, may provide for certain exceptions to the prohibitions based on necessity, charity, public welfare, safety and morals, Provided, that any classification be not purely arbitrary, unreasonable or discriminatory. The courts have been in complete unanimity on this point.

The North Carolina Supreme Court has been consistent in this respect; and in connection therewith we quote several of its former decisions:

State v. *Davis*, 171 N. C. 809, 89 S. E. 43:

> "These are distinct and easily severable occupations, and there is no finding that those engaged in them come in competition with each other."

Smith v. *Wilkins*, 164 N. C. 135, 80 S. E. 168:

> "The first and fourth exceptions or exemptions may be considered together. Keeping in mind the General Assembly has the power to classify, and that it is not required to tax all trades, these exceptions or exemptions amount to no more than the exercise of the power of classification. In other words, if the General Assembly has the power to classify, based on the difference in the business engaged in, it may place proprietary medicines in one class and books, fuel, etc., in another; it may tax one of these classes one amount and the other a different amount, or it may tax one and refuse to tax the other. It will also be observed that no one engaged in selling the articles enumerated in these exceptions come in Competition with the plaintiff, who is licensed to sell medicinal and proprietary medicines." (Emphasis ours.)

State v. *Scoggin*, 236 N. C. 1 (August, 1952), 72 S. E. 2d 97 at 102:

"A municipality is a governmental agency—and so the General Assembly may delegate to a City or town the authority . . . This includes the power to prescribe rules or standards of conduct, the violation of which shall constitute a criminal offense—But this power is subordinate to the constitutional guarantee of equality of privilege and of burden contained in The Fourteenth Amendment. **Any attempted exercise** of the police power which results in a denial of the equal protection law is invalid."

"Therefore, an ordinance must be uniform, and must have a *reasonable relation to the evil sought to be remedied.* Its objectives must be the *elimination of the known evil* and must be so designed that it applies alike to all within a designated class."

As stated previously, there is no gainsaying the authority of the City to prohibit on Sunday all forms of labor, including all merchandising, save works of necessity and charity. On the other hand, at what conceivable evil is an ordinance aimed which permits practically every article defendant sells to be sold in eleven other types of establishments and at the same time makes it a criminal offense for grocers and curb market operators to sell them? **Defendant holds the same license from The City of High Point as that issued to delicatessens, ice cream and confectionery stores, sandwich shops, newsstands, drug stores, dairies and bakeries, but is prohibited from competing with them on Sunday. With the exception of drug stores, and, in their case only in the prescription department, defendant can see no logical theory with which the sales in the listed establishments can be tied more securely to necessity or charity than sales from his curb market. At this point it should be noted that with respect to drugstores, the ordinance reads as follows:**

"drug stores furnishing medical or surgical supplies, cigars, tobacco, ice cream, candies, nuts, soft drinks, newspapers and magazines; . . ."

There is no *only*, limiting drug store sales on Sunday to the items listed; and it would therefore appear impossible to sustain an indictment of a drug store operator for the sale of any item in his store, so long as he has on hand for sale the articles listed as well. In the days of modern, up to date drug stores, this would mean—and in operation does mean—that drug stores dispense on Sunday everything they handle—from baby foods through coffee, home permanents and lawn mowers. And it is to be noted that the North Carolina Supreme Court in upholding the constitutionality of the ordinance (Appendix A, page five) relies particularly on the fact that other establishments exempted from the operation of the ordinance are so excepted for the sale of certain items—presumably related in some reasonable fashion to necessity, charity, or the public health, welfare, safety or morals, although a close scrutiny of the list fails to reveal how—"Only." (Emphasis The Court's.) The Supreme Court of North Carolina also held, in *State* v. *Trantham*, 230 N. C. 641; 55 S. E. 2d 198 (September 1949), which was also a case in which the constitutionality of a Sunday ordinance was upheld:

> "The one requirement is that the ordinance must affect all persons similarly situated or engaged in the same business without discrimination . . .
>
> "Only those ordinances which discriminate between those of a particular group or class who are similarly situated with reference to the *subject matter* of the legislation come within the constitutional inhibitions . . . (Emphasis ours.)
>
> "It must appear that the alleged discriminatory provisions operate to the hurt of the defendant or adversely affect his rights or put him to a disadvantage . . ."

Of particular interest in the Court's holding in the *Trantham* case is the following:

"It is Not made to appear that the defendant keeps in stock for sale Any One of the enumerated articles. *No competitor* of his has been accorded a privilege which is denied to him." (Emphasis ours.)

At this point we should like to reiterate: Defendant carries all the enumerated articles, with the exception of petroleum products and automobile accessories.

The North Carolina Court again reiterated its position as to what constitutes discriminatory classification in *State v. McGee*, 237 N. C. 633; 75 S. E. 2d 783 at 787 (May, 1953):

"It is a fundamental rule that the governing body of a municipality, clothed with power to enact and enforce ordinances for the observance of Sunday, 'is vested with discretion in determining the *kinds* of pursuits, occupations or businesses to be included or excluded, and its determination will not be interfered with by the courts provided the classification and discrimination made are founded upon some reasonable distinction and have some reasonable relation to the public welfare, peace and safety."

The *McGee* case was another in which the constitutionality of a Sunday closing ordinance was challenged, the Court holding it valid on the ground that defendant had failed to show that any competitor of his—*i. e.* a seller of outdoor motion picture entertainment—had been favored, to defendant's hurt.

Sunday ordinances have been the subject of litigation with increasing frequency; and the large majority of them have been upheld. There is, however, a unanimity of opinion as to what constitutes invalid bases of classification in all jurisdictions, including this Court. We wish to quote from a few decisions of the highest courts of other States, and of The Supreme Court of The United States:

119 A. L. R., page 747, quoting The Supreme Court of Illinois in *City of Mount Vernon* v. *Harry Julian*, 369 Ill. 447; 17 N. E. 2d 52 (1938):

"Section 477 (Code, Mount Vernon, Illinois: Sunday Business and Labor: 'It shall be unlawful for any person to open or permit to be kept open his place of business on Sunday within this City provided that this section shall not be applicable in cases of necessity or charity, nor to hotels, restaurants, eating places, drug stores, tobacco stores, confectionery stores, news dealers, ice dealers, shoe shining parlors, garages, gasoline filling stations, telephone exchanges, telegraph offices and moving picture theatres.' " (Ordinance in question.)

The Court held:

". . . Where the *ostensible object* of an enactment is to secure the public comfort, welfare or safety, it must appear to be adapted to that end. It cannot invade the rights of person and property *under the guise* of a mere police regulation, *when it is not such* in fact; . . .

"The distinction, however, is not a valid one because if exceptions are to be permitted, *without any direct relation to the general welfare,* then such exceptions might be multiplied until but *one occupation* remained. It is apparent that if a general Sunday closing ordinance is to be valid, the *exceptions* to its operation *must bear* some reasonable relation to the public health, safety or morals or general welfare, and this relation must be such as to bear the scrutiny of the courts on a review to determine its reasonableness.

"A reference to the various annotations will disclose that decisions on this troublesome question have been nearly as varied as the ordinances under consideration and it is possible to find language of courts and decisions sustaining almost any view one may care to take on the subject. Certain language of The United States Supreme Court tends to sustain the conclusion which we have arrived at (Gulf, Colorado and Santa Fe Rwy. v. Ellis, 165 U. S. 150; 17 S. Ct. 225; 41 L. Ed. 666) . . .

"We have always held that an act which has no tendency to affect or endanger the public in connection with

health, safety, morals or general welfare, and which is *entirely innocent in character,* is not within the police power. (Citing cases.) If it be conceded that the general welfare is served by requiring one day of rest in each seven days, excepting only works of necessity and charity, the ordinance we are considering fails to attain this purpose. No reason is suggested, and we can think of none, why the shop of a dressmaker or milliner should be required to close while the cigar store remains open. None is apparent why a dry goods store should be required to close when a newsstand continues to operate. We do not see where the public welfare is served by closing the *grocery* store and allowing a *confectionery* store to remain open, nor in *closing a notions store* while a drug store next door which *sells notions* is permitted to operate. Under this ordinance a bakery which sells bread must be closed but a shoe shining shop which sells cigars and newspapers is unaffected. A motion picture theatre with its mechanical acting and mechanical music may run, while a legitimate theatre with human actors and musicians must refrain from operation. These distinctions appear to us to be entirely arbitrary, without relation to the public health, safety, morals or welfare. This Court has repeatedly announced the rule to be that *liberty* . . . means not only freedom of citizens from servitude and restraint, but is deemed to embrace the right of every man to be free in the use of his powers, faculties and property, and to adopt and pursue and employ these things in such lawful way as he may choose, subject *only* to such restraints as are necessary to secure the common welfare." (Emphasis ours throughout.)

In its consideration of this ordinance, the Illinois Supreme Court reviewed a Colorado case, quoting the Supreme Court of the latter State as follows: (*Allen* v. *Colorado Springs,* 101 Col. 498; 75 Pac. 2d 141 (1938)): " 'So an ordinance declaring it unlawful for any store to keep open on Sunday for the sale of merchandise, except when required by necessity, but which was expressly inapplicable to retail drug stores and

other *enumerated forms* of business, has been held to have the 'vice of discriminating' where there is no basis for discrimination, and accordingly violates a constitutional prohibition, of special and discriminatory legislation, in that it permitted drugstores to sell on Sunday soaps, flavoring extracts, teas, coffees, spices and similar *staple grocery* products, usually carried by retail grocery stores.' "

Summing up, the Illinois Supreme Court held:

"It is our opinion that the ordinance in question is arbitrary and discriminatory and not a proper exercise of the police power and is, therefore void."

In *Elliott* v. *State*, 20 Ariz. 389; 242 Pac. 340, 46 ALR 284, the Supreme Court of Arizona held, in part:

"We therefore deduce from the foregoing principles that in the State of Arizona it is competent for the Legislature to provide for a general cessation of labor at such times as it may think proper, even though certain specified occupations may be declared *exempt* from the law as works of *necessity* and *charity*, but that it may not prohibit the exercise of businesses or occupations *legitimate in themselves* which do not carry inherent reasons for special discriminations, while allowing general privileges to all other similar occupations. Let us apply this test to the ordinance in question. It is evident from its language that it is *not a case of general cessation* from labor, *with special exemption for reasons of necessity or charity*, but rather a special inhibition placed upon otherwise praiseworthy and legitimate businesses, with a general exemption to all other classes."

". . . Practical justice demands that all who are in the same category should be treated alike in the exercise of authority for the good order of the community . . . The grouping must *include all who have substantially the same relation to the end to be attained* . . . *Mere difference in name* is not in every instance a dis-

tinguishing characteristic supporting the exercise of the police power against the one and not the other."

In *Connolly* v. *Union Pipe Company*, 46 L. Ed. 679, The United States Supreme Court held (at page 689):

"But as The Constitution of The United States is the supreme law of the land, anything in the Constitution or statutes of the states notwithstanding, a statute of a state, even when avowedly enacted in the exercise of its police powers, must yield to that law. No right granted or secured by the Constitution of The United States can be impaired or destroyed by a state enactment, whatever may be the source from which the power to pass such enactment may have been derived . . .

"The State undoubtedly has the power, by appropriate legislation, to protect the public morals, the public health, and the public safety; but, if by their necessary operations, its regulations looking to either of these ends amounts to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void . . .

"It is sometimes difficult to show that a state enactment, having its source in a power not controverted, infringes rights protected by the National Constitution. No rule can be formulated that will cover every case. But upon this general question we have said that the guaranty of equal protection of the laws means 'that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or *other classes* in the same place and under like circumstances.' We have also said 'the 14th Amendment, in declaring that no state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws undoubtedly intended not only that there should be no arbitrary deprivation of life or . . .; but that . . . *no impediment* should be interposed to the *pursuits* of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon

> one than are laid upon others in the same calling and condition . . .' "

and at page 691:

> "But different considerations control where the state, by legislation, seeks to regulate the enjoyment of rights and the pursuit of callings connected with domestic trade. In prescribing regulations for the *conduct of trade,* it cannot divide those engaged in trade into classes and *make criminals of one class* if they do certain forbidden things, while *allowing another* and favored class engaged in the same domestic trade *to do the same things with impunity.*" (emphasis ours)

The United States Supreme Court has also held, in *Gulf, Colorado and Santa Fe Rwy. Company, Pff. in Error,* v. *W. H. Ellis,* 41 L. Ed. 666:

> "Other cases of a similar character may be found in the reports, but a mere accumulation of authorities is of little value. It is apparent that the *mere fact of classification is not sufficient* to reliev- a statute from the reach of the equality clause of the 14th Amendment, and that in all cases it must appear not only that a classification has been made, *but also that it is one based upon a reasonable ground*—upon some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection."

Under the ordinance in question, as it is written and in operation, it is at present legal and proper for eleven types of mercantile establishments, and consequently some hundreds of individual retail stores, to sell dozens of articles to the public during the Sunday closing hours. Drug stores, whose stock of goods frequently parallel that of department stores, sell any item they have on hand. Curb market operators, however, whose very reason for existence is the supplying of emergency provisions—either refreshments for the unexpected guest, or items forgotten during general shopping hours—are subject to criminal prosecu-

tion for selling anything at all, whether it be those items specifically listed in the ordinance as exceptions from its operation (presumably on the basis of their relation to the public health, welfare, safety or morals although in the case of nuts, particularly, it is difficult to discern the relationship) or other items such as peaches, toilet paper or tomatoes. It is superfluous to note that any attempt to group all of the excepted articles under the heading of necessity or charity would be absurd, particularly if one goes further and considers the numerous items not listed.

Conclusion

In an attempted exercise of its police power, The City of High Point has enacted and is enforcing a Sunday closing ordinance, in which ordinance the classification of those who may do business on Sunday and those for whom doing business constitutes a crime has been made on some basis utterly without any discernible relation, reasonable or otherwise, to public health, welfare, safety or morals, or to works of necessity and charity. By this ordinance appellant has been and is being deprived of substantial rights guaranteed to him by The Constitution of the United States, to his hurt. Appellant therefore prays that the Court note jurisdiction of this cause for final hearing upon the question involved in accordance with the rules of the Court, because the Court below has disposed of the question in a way which is in conflict with the Constitution of The United States; and the accepted sound course of judicial procedure calls for exercise by The Supreme Court of The United States of its power of supervision and review to halt the same.

Respectfully submitted,

ARCH K. SCHOCH,
Counsel for Appellant.

SCHOCH AND SCHOCH,
Of Counsel.

APPENDIX "A"

OPINION OF THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

IN THE SUPREME COURT OF NORTH CAROLINA

Fall Term, 1953

No. 653—Guilford

STATE OF NORTH CAROLINA

v.

JOE TOWERY

OPINION

Appeal by defendant from Sharp, Special Judge, September Criminal Term, 1953, of Guilford (High Point Division).

Criminal prosecution on a warrant charging the violation of a city ordinance.

The defendant was tried and convicted in the Municipal Court of the City of High Point and from the judgment imposed appealed to the Superior Court.

The warrant charges that the defendant, within the city limits of the City of High Point, or within one mile thereof, did wilfully and unlawfully operate a place of business, to wit: a curb market, by remaining open for the purpose of selling and offering for sale goods, wares and merchandise between the hours of midnight Saturday and midnight Sunday by selling tomatoes, peaches and toilet paper, on Sunday, 26 July, 1953, in violation of Section 17.32 of The Code of The City of High Point, as amended 17 June, 1952.

Section 17.32 of The Code of The City of High Point, as amended in pertinent part, reads as follows:

"It shall be unlawful for any place of business to remain open for the purpose of selling or offering for sale goods, wares, merchandise or services between the hours of midnight Saturday and midnight Sunday, except as follows:

hotels; boarding houses; restaurants; cafes, delicatessen and sandwich shops furnishing meals and selling bread, cooked or prepared meats incidental to the operation of such business; filling stations furnishing petroleum products and automobile accessories; garages furnishing repair work or storage; ice cream or confectionery stores, furnishing ice cream, cigars, tobacco, nuts and soft drinks *only;* cigar stands and newsstands furnishing cigars, tobacco, candies, nuts, newspapers, magazines and soft drinks *only;* drugstores furnishing medical or surgical supplies, cigars, tobacco, ice cream, candies, nuts, soft drinks, newspapers and magazines; ice dealers, for the manufacture and sale of ice; dairies, for the manufacture and sale of dairy products; bakeries, for the manufacture, sale and delivery of bakery products; * * * ." (Italics ours.)

The State offered evidence tending to show that the defendant made the sales as set out in the warrant. Whereupon, counsel for the defendant stipulated that the defendant "does not operate a hotel, boarding house, restaurant, cafe, a delicatessen and sandwich shop furnishing meals, filling station or garage or an ice cream and confectionery store as such, or a cigar and newsstand as such, or a drugstore, furnishing medical and surgical supplies, nor is he an ice dealer manufacturing ice, nor does he operate a dairy for the manufacture and sale of dairy products, nor does he operate a bakery for the manufacture and delivery of bakery products, but that he operates exclusively as a curb market operator for the sale of merchandise generally found in curb markets."

The defendant testified: "I was open for business on July 26, 1953. That was a Sunday. I sold the items that day, consisting of tomatoes, peaches and toilet paper, for which I stand charged here. In the operation of my curb market I sell bread, cooked and prepared meats, ice cream, cigars, tobacco, nuts, soft drinks, candies, newspapers, magazines, some medical supplies, * * * and all kinds of salve and stuff like that, bandaids and tape, iodine, merthiolate, mercurochome—general medical supplies, ice cream, dairy products, butter, milk, eggs and other items normally sold by dairy concerns, bakery products, consist-

ing of cookies, cakes, bread, those items generally sold by bakers. I sell a great many other items as well, items usually found in a grocery store. I sell items usually found in a confectionery store, dairies, tobacco stores, delicatessen stores. I do not sell petroleum products or automobile accessories. I do sell soft drinks. These other business are in competition with me." On cross examination, the defendant testified: "I sell flour in bulk, sugar in bags, various fruit, fresh fruit, canned goods, fresh vegetables, sausage and bacon. I do not prepare meals there. My sale of bread and meat is not incidental to preparation of any meal. I sell practically everything that is sold in a general grocery store or super market. • • • on the date of the 26th of July I was selling any and everything I had in my place."

The jury returned a verdict of guilty, and from the judgment imposed, the defendant appeals, assigning error.

Attorney General McMullan, Asst. Attorney General Love, and Gerald F. White, Member of Staff, for the State. Schoch & Schoch, attorneys for appellant.

DENNY, *J.*:

Attacks on the validity of Sunday ordinances have been a fruitful source of litigation in this country. In recent years particularly, there seems to be a growing desire on the part of many individuals, who are engaged in commercial enterprises, to completely ignore the observance of Sunday as a day of rest. In fact, in some jurisdictions, the courts seem to have concluded that Sunday closing ordinances are invalid if the mercantile establishments, which are required to close on Sunday, carry items of merchandise similar to those which may be sold on Sunday by the excepted class of business establishments. Elliott v. State, 29 Ariz. 389, 242 P. 340, 46 ALR 284; Allen v. City of Colorado Springs, 101 Colo. 498, 75 P. 2d 141. In the case of Mt. Vernon v. Julian, 369 Ill. 447, 17 N. E. 2d 52, 119 ALR 747, the Supreme Court of Illinois said: "No reason is suggested and we can think of none why the shop of a dressmaker or milliner should be required to close while the cigar store remains open. None is apparent why a dry goods store should be required to close when a newsstand continues to operate. We do not see where the public welfare is served

by closing the grocery store and allowing a confectionery store to remain open, nor in closing a notions store while a drug store next door which sells notions is permitted to operate." It would seem that the reasoning of the Illinois Court ignores the right of a municipality in adopting a Sunday closing ordinance to discriminate as between classes, S. v. Trantham, 230 N. C. 641, 55 S. E. 2d 198, but instead makes the question of competition or the right generally to conduct a business the determinative factor.

It is generally conceded that the governing body of a municipality, clothed with power to enact and enforce ordinances for the observance of Sunday, "is vested with discretion in determining the kinds of pursuits, occupations, or businesses to be included or excluded, and its determination will not be interfered with by the courts provided the classification and discrimination made are founded upon reasonable distinctions and have some reasonable relation to the public peace, welfare, and safety." 50 Am. Jur., Sundays & Holidays, Section 11, page 810; S. v. McGee, 237 N. C. 633, 75 S. E. 2d 783.

In S. v. Trantham, supra, Barnhill, J., pointed out that: "Legislative bodies may distinguish, select, and classify objects of legislation. It suffices if the classification is practical. Magoun v. Bank, 170 U. S. 283, 42 L. Ed. 1037; S. v. Davis, supra (171 N. C. 809, 89 S. E. 40). They may prescribe different regulations for different classes, and discrimination as between classes is not such as to invalidate the legislative enactment. Smith v. Wilkins, 164 N. C. 135, 80 S. E. 168. The very idea of classification is inequality, so that inequality in no manner determines the matter of constitutionality. Bickett v. Tax Commission, 177 N. C. 433, 99 S. E. 415; R. R. v. Matthews, 174 U. S. 96, 43 L. Ed. 909. The one requirement is that the ordinance must affect all persons similarly situated or engaged in the same business without discrimination. City of Springfield v. Smith, 322 Mo. 1129, 19 S. W. 2d 1."

The defendant here, like the defendant in S. v. McGee, supra, does not claim that the ordinance discriminates against him in so far as it applies to any other person or persons similarly situated. He simply claims that the busi-

ness establishments permitted to remain open on Sunday sell certain articles of merchandise similar to those which he sells, therefore, he says they are his competitors. He falls into error in undertaking to make competition as between classes the test rather than discrimination within a class.

In the case of S. v. Medlin, 170 N. C. 682, 86 S. E. 597, the Town of Zebulon had adopted an ordinance which prohibited keeping any shop or store open on Sunday for the purpose of buying and selling (except ice), but provided that "drug stores may be kept open at all times on Sunday for the sale of drugs and medicines; and from 6 to 9:30 o'clock in the morning and from 1 to 4:30 o'clock in the afternoon, for the sale of drugs, medicines, mineral waters, soft drinks, cigars and tobacco only." The defendant who did not operate a drug store, opened his grocery store between the hours of 6 and 8 o'clock a. m., on Sunday, 18 January, 1915, while the above ordinance was in full force and effect, and sold cigars, cigarettes and Coca-Cola to several purchaser and received cash payments therefor. At this same time, a drug store in Zebulon was open for the sale of these same articles. The Court said: "This ordinance, which prohibits keeping open stores and other places of business for the purpose of buying or selling, except ice, drugs and medicines, and permits the drug stores to sell soft drinks and tobacco for a limited time in the morning and afternoon, as a convenience to public customs, is not an unreasonable exercise of the police power." This decision has been followed and cited with approval in S. V. Davis, 171 N. C. 809, 89 S. E. 40; S. v. Burbage, 172 N. C. 876, 89 S. E. 795; Lawrence v. Nissen, 173 N. C. 359, 91 S. E. 1036; S. v. Kirkpatrick, 179 N. C. 747, 103 S. E. 65; S. v. Weddington, 188 N. C. 643, 125 S. E. 257, 37 ALR 573, and S. v. McGee, supra.

Moreover, it will be noted that in the ordinance under consideration, the exemption as to cafes, delicatessens and sandwich shops is limited to those furnishing meals and selling bread, cooked or prepared meats incidental to the operation of such business. Likewise, the exemption extends to (1) "ice cream or confectionery stores, furnishing ice cream, cigars, tobacco, nuts and soft drinks *only;*" and

(2) "cigar stands and newsstands furnishing cigars, tobacco, candies, nuts, newspapers, magazines and soft drinks *only*." (Italics ours.)

The defendant, according to his own testimony, operates a curb market and sells "practically everything that is sold in a general grocery store or super market." Therefore, he has shown no arbitrary or unreasonable exercise of the police power in the classification and selection of businesses to be closed on Sunday.

As stated by Stacy, C. J., in S. v. Weddington, supra: "It must be remembered that we are dealing with the exercise of an unquestioned police power, and whether it transcends the bounds of reason—not with its wisdom or impolicy." S. v. Vanhook, 182 N. C. 831, 109 S. E. 65.

After a careful consideration of the question raised on this record, and the authorities bearing thereon, we are of the opinion that the ordinance in so far as it has been challenged on this appeal, is constitutional and, therefore, the verdict below must be upheld.

No Error.

No. 601. TOWERY *v.* NORTH CAROLINA. Appeal from the Supreme Court of North Carolina. *Per Curiam:* The appeal is dismissed for the want of a substantial federal question. *Arch K. Schoch* for appellant. Reported below: 239 N. C. 274, 79 S. E. 2d 513.